STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MARY MANDANA WATERSTONE, Defendant-Appellee.	FOR PUBLICATION April 10, 2012 9:05 a.m. Nos. 303268 Wayne Circuit Court LC No. 10-010881-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARY MANDANA WATERSTONE, Defendant-Appellant.	No. 303703 Wayne Circuit Court LC No. 10-010881-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

MURPHY, C.J.

In these consolidated appeals, the Michigan Attorney General (AG) charged defendant with four counts of felony misconduct in office under MCL 750.505 arising out of a criminal prosecution in which defendant, sitting as a circuit court judge, is alleged to have willfully neglected her judicial duties by failing to disclose certain communications and perjured testimony. MCL 750.505 provides for criminal penalties and punishment when a person commits an offense that was indictable at the common law, such as misconduct in office, absent a statutory provision that expressly punishes the charged offense. We find that MCL 750.478, a misdemeanor statute, constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the same elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which is the sole statute relied on by the AG in regard to the four counts at issue, MCL 750.505 cannot be invoked as a basis to try and convict defendant. Defendant is entitled to

dismissal of the charges without prejudice. Accordingly, we affirm the circuit court's ruling quashing counts 12, 13, and 14 of the complaint, albeit for different reasons; however, we reverse the court's ruling allowing count 15 to proceed to trial.[1]

I. FACTUAL AND PROCEDURAL HISTORY

The underlying criminal case presided over by defendant concerned drug charges brought by the Wayne County Prosecutor's Office against Alexander Aceval and Ricardo Pena. The facts in that prosecution with respect to Aceval's alleged criminal activities, along with the facts regarding our defendant's behavior on the bench, were set forth as follows in *People v Aceval*, 282 Mich App 379, 382-385; 764 NW2d 285 (2009):

> This matter arises out of an illegal drug transaction. On March 11, 2005, police officers Robert McArthur, Scott Rechtzigel, and others, acting on information obtained from Chad William Povish, a confidential informant (CI), were on surveillance at J Dubs bar in Riverview, Michigan. Povish previously told police officers that [Aceval] had offered him $5,000 to transport narcotics from Detroit to Chicago. That day, the officers observed [Aceval], Povish, and Bryan Hill enter the bar. [Aceval] arrived in his own vehicle, while Povish and Hill arrived in another. Eventually the three individuals left the bar and loaded two black duffel bags into the trunk of Povish's car. Povish and Hill then drove away, while [Aceval] drove away in his own vehicle. Subsequently, the officers stopped both vehicles and found packages of cocaine in the duffel bags located in the trunk of Povish's car. [Aceval] was subsequently arrested and charged with possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to commit that offense, MCL 750.157a.
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> Before trial, [Aceval] moved for the production of the identity of the CI. During an evidentiary hearing on June 17, 2005, [Aceval] requested that the trial court, Judge Mary Waterstone, conduct an in camera interview of McArthur, the officer in charge of the investigation. The judge agreed, and in the conference it was revealed that McArthur and Rechtzigel knew that Povish was the CI. Further, the officer told the trial court that Povish was paid $100 for his services, plus "he was going to get ten percent, whatever we got." The conference was sealed and the trial court denied [Aceval's] motion.
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> Subsequently, [Aceval] filed a motion to suppress certain evidence. During a hearing on September 6, 2005, Rechtzigel lied when he testified, in response to defense counsel's questioning, that he had never had any contact with Povish before March 11, 2005. The prosecutor did not object. On September 8, 2005, in another sealed in camera conference between the judge and the prosecutor, the prosecutor admitted that she knew that Rechtzigel had knowingly committed perjury but stated that she "let the perjury happen" because "I thought

[1] Counts 12 through 15 were the only counts that pertained to defendant.

> an objection would telegraph who the CI is." In response, the judge stated that she thought "it was appropriate for [the witness] to do that." Further, the court added, "I think the CI is in grave danger. . . . I'm very concerned about his identity being found out."
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> The matter went to trial on September 12, 2005. At trial, the prosecutor and the judge continued their efforts to protect the CI's identity. Povish testified that he had never met Rechtzigel or McArthur before they stopped his vehicle on the day that he received the duffel bags and that neither had offered him a deal of any kind. He further testified that he did not know what was in the duffel bags and that, until trial, he believed that he could be charged with a crime for his role in the incident. The prosecutor made no objection to this testimony. The prosecutor and the judge again indicated, in another sealed ex parte bench conference on September 19, 2005, that they knew Povish had perjured himself in order to conceal his identity. At the close of the trial, the jury was unable to reach a verdict and, thus, the trial court declared a mistrial.
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> On December 7, 2005, attorney Warren E. Harris filed an appearance to represent [Aceval] in his retrial, again in Judge Waterstone's court. On March 6, 2006, attorney David L. Moffitt petitioned for leave to file a limited appearance solely for purposes of filing certain motions by [Aceval], which the trial court granted on March 17, 2006. Subsequently, at a hearing on March 28, 2006, [Aceval] indicated that he had become aware that the CI was Povish and argued that the case should be dismissed because of the trial court's and the prosecutor's complicit misconduct in permitting perjured testimony. [Aceval] also requested that both the prosecuting attorney and Judge Waterstone disqualify themselves from the case. Judge Waterstone disqualified herself on the record. The following day, Judge Vera Massey–Jones, the successor judge, entered an order unsealing the three in camera interviews.
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> [Aceval] retrial began on June 1, 2006, with Harris acting as counsel. Before trial, [Aceval] allegedly contacted a prosecution witness and directed him to provide false testimony in support of the defense. After the prosecution discovered this information, it informed the trial court and defense counsel. Subsequently, the witness testified that [Aceval] had asked him to lie and he purged his testimony. Thereafter, [Aceval] pleaded guilty to the charge of possession with intent to distribute more than 1,000 grams of cocaine.

This Court affirmed Aceval's plea-based conviction. *Id.* at 392-393.[2]

[2] Aceval was tried jointly, before separate juries, with codefendant Pena. Pena's involvement in the narcotics transactions is unclear from the record and the discussion in *Aceval*; however, he

Subsequently, after a series of issues and problems were resolved related to the proper prosecuting entity for purposes of the case at bar, see *People v Waterstone*, 287 Mich App 368; 789 NW2d 669 (2010), rev'd 486 Mich 942 (2010), the AG pursued charges against defendant. The AG had also brought charges against the prosecutor and the two police officers involved in the concealment and perjury alluded to in *Aceval*. The charges brought against defendant were contained in counts 12 through 15 of the AG's complaint, which provided:

> COUNT 12 DEFENDANT(S) (04): COMMON LAW OFFENSES
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . . .
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> COUNT 13 DEFENDANT(S) (04): COMMON LAW OFFENSES
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 19, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . . .
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> COUNT 14 DEFENDANT(S) (04): COMMON LAW OFFENSES
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by concealing perjured testimony from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena by her rulings and orders; contrary to MCL 750.505. . . .
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> COUNT 15 DEFENDANT(S) (04): COMMON LAW OFFENSES
> did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. . .

The district court bound defendant over on all four counts of misconduct in office, but the circuit court quashed counts 12 through 14, while allowing the AG to go to trial solely on count 15. In Docket No. 303268, the AG appeals by leave granted the circuit court's order quashing the first three counts. In Docket No. 303703, defendant appeals by delayed leave granted the circuit court's order permitting the AG to pursue the final count. It is unnecessary for us to review the reasoning behind the district and circuit courts' rulings, given that we are resolving

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eventually pleaded guilty to conspiracy to deliver more than 1,000 grams of a controlled substance.

these consolidated appeals on an issue raised by us *sua sponte* at oral argument, which was not addressed nor argued below. We ordered the parties to submit supplemental briefs to address, in part, whether MCL 750.478 precludes the AG's prosecution of defendant under MCL 750.505. Briefs were submitted, and we now proceed to rule.

II. ANALYSIS

A. STANDARDS OF REVIEW

"This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information." *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). A trial court necessarily abuses its discretion when it makes an error of law. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). This Court reviews de novo questions of statutory construction. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

B. PRINCIPLES OF STATUTORY INTERPRETATION

In *Flick*, the Michigan Supreme Court recited the well-established principles that govern our interpretation of a statute:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. [*Flick*, 487 Mich at 10-11 (citations, alteration, and internal quotation marks omitted).]

With respect to statutory interpretation of provisions contained within the Penal Code, MCL 750.2 provides:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

C. DISCUSSION

Counts 12 through 15 have one important feature in common; they all charge defendant with "willfully neglecting her judicial duties." The AG brought the charges pursuant to MCL 750.505, which provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this

> state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

"The offense of misconduct in office was an indictable offense at common law." *People v Couto (On Remand)*, 235 Mich App 695, 705; 599 NW2d 556 (1999). In *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), our Supreme Court observed:

> At common law, misconduct in office was defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) . . ., quoting Perkins & Boyce, Criminal Law (3d ed), p 543. An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance. Perkins, p 540.

The AG has been adamant throughout the proceedings that *all four charges* are predicated on nonfeasance and nonfeasance alone, and the counts themselves are drafted in terms of willful neglect of duty.[3] One of the questions posed in this appeal, and the only one that need be addressed given our view on the issue, is whether MCL 750.478 precludes a prosecution by the AG against defendant under MCL 750.505. An indictable common-law offense can be charged by the prosecution pursuant to MCL 750.505 unless punishment for that offense is otherwise expressly provided for by statute. It is proper to dismiss a charge brought under MCL 750.505 if the charge "'sets forth all the elements of [a] statutory offense.'" *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991) (citation omitted).

In *Thomas*, the defendant was charged, in part, with the common-law felony of obstruction of justice under MCL 750.505 for having prepared a false police incident report. The Court addressed the argument whether the offense should have been dismissed in light of MCL 752.11, which makes it a misdemeanor for a public official to willfully and knowingly fail to uphold or enforce the law, resulting in a denial of legal rights. *Thomas*, 438 Mich at 453. The Court found that MCL 752.11 concerned omissions of duty, i.e., nonfeasance, and failed to include affirmative acts and commissions, i.e., misfeasance or malfeasance; therefore, because the conduct at issue, falsifying a police report, was an act of commission, it exceeded the

[3] At first glance, counts 12 and 13 appear to concern acts of misfeasance and/or malfeasance, where they address ex-parte communications permitted or considered by defendant, but the language regarding these communications is directly tied to the concealment of the communications, given that defendant failed to share the communicated information – nonfeasance – with Aceval and Pena. It is the concealment aspect of defendant's actions that drive counts 12 and 13. Had defendant engaged in the ex-parte communications and then informed Aceval and Pena about the communications, there would have been no basis for a criminal prosecution. Thus, the overall nature of counts 12 and 13 relates to nonfeasance, which is exactly what the AG claims.

strictures of MCL 752.11. *Id.* at 454-455. Accordingly, the prosecutor was not prohibited from charging the defendant with common-law obstruction of justice under MCL 750.505. *Id.* at 455.[4]

MCL 750.478, the statute at issue here, addresses the willful neglect of duty by a public officer and provides as follows:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, *every willful neglect to perform such duty*, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00. [Emphasis added.]

In *People v Bommarito*, 33 Mich App 385; 190 NW2d 359 (1971), the defendant, a former county undersheriff, was charged with four counts of violating MCL 750.478 relative to various failures to enforce the law – nonfeasance. This Court held that "[f]ailure to enforce the law or prevent a violation of which he is cognizant constitutes a breach of duty[,]" and "[s]uch a breach of duty is a wilful neglect of duty in violation of MCL[] 750.478." *Id.* at 388-389. In *People v Medlyn*, 215 Mich App 338; 544 NW2d 759 (1996), this Court also addressed a prosecution under MCL 750.478, wherein the defendant, a deputy sheriff, was convicted of willful neglect of duty for his failure to report a physical and sexual assault against a prisoner in the county jail after the prisoner had informed the defendant of the assault; the prisoner was repeatedly beaten and raped thereafter on a daily basis before being transferred to a new ward. The focus of the appeal regarded the meaning of "willful" neglect, which we shall address in detail below, with this Court initially noting that there was no dispute that the defendant "had a duty to report any allegations made by inmates to him." *Id.* at 341. The Court affirmed the defendant's conviction under MCL 750.478. *Id.* at 346.

Bommarito and *Medlyn* make abundantly clear, and it is readily evident from the plain and unambiguous language of the statute, that MCL 750.478 is a statutory provision that makes it a violation of law for a public officer to willfully neglect to perform a legal duty; it squarely concerns omissions of duty. Stated otherwise, MCL 750.478 criminally punishes a public officer for "failing to perform any act that the duties of the office require of the officer, nonfeasance." *Perkins*, 468 Mich at 456. It thus appears that the crime of willful neglect of duty under MCL 750.478 is the same as the crime of misconduct in office under the common law in relationship

[4] We also note the language in *Coutu*, 235 Mich App at 705, wherein the Court stated that the prosecution properly charged the defendants under MCL 750.505 for misconduct in office, "assuming of course that the conduct charged . . . was not more properly charged pursuant to another statute[.]" In *People v Davis*, 408 Mich 255, 275; 290 NW2d 366 (1980) (COLEMAN, C.J.), the Court observed, "[S]ince the Legislature has expressly made a provision for the punishment of an officer who receives a promise or any valuable thing as consideration for delaying an arrest [MCL 750.123], this conduct is not punishable under MCL 750.505 . . . because it is not an offense 'for the punishment of which no provision is expressly made by any statute of this state.'"

to a nonfeasance theory of prosecution. Unlike the situation in *Thomas*, 438 Mich 448, where the defendant was charged with committing acts of misfeasance or malfeasance and a statute concerning nonfeasance was examined, defendant here was charged with acts of nonfeasance, or failure to perform a legal duty, and MCL 750.478 encompasses the failure to perform a legal duty, nonfeasance. The AG's case against defendant, prosecuted under MCL 750.505, actually sets forth all the elements of MCL 750.478, where the AG charged defendant with "willfully neglecting her judicial duties."

We next address the elements of corrupt behavior or intent and willful neglect in relationship to MCL 750.505 and MCL 750.478. We find that the misdemeanor statute, MCL 750.478, which punishes the willful neglect of duty, necessarily encompasses the element of corrupt behavior and that corrupt behavior is also an element of misconduct in office committed through nonfeasance for purposes of MCL 750.505. There is no corrupt-behavior distinction between the two statutes. Even were we to assume that corrupt behavior is an element relative to MCL 750.505 and not MCL 750.478, the misdemeanor statute would control because of the manner in which the AG framed the counts and pursued the prosecution, which was focused simply on willful neglect of judicial duties. In other words, the charges, as presented, fall directly within the parameters of MCL 750.478. More importantly, however, we find that, with respect to misconduct in office under a theory of nonfeasance, corrupt behavior or intent is the equivalent of willful neglect under MCL 750.478.

In discussing misconduct in office as prosecuted under MCL 750.505, this Court in *People v Milton*, 257 Mich App 467, 472; 668 NW2d 387 (2003), noted that the "defendant's misconduct was intentional, i.e., resulted from a corrupt intent." In *Couto*, 235 Mich App at 706, after indicating that the word "corruption" means a "'sense of depravity, perversion or taint,'" and following a dictionary exploration of each of those terms, this Court concluded, pursuant to the definitions, that "a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer."[5] The Court noted that it is deemed "corrupt" for a public officer to purposely commit a violation of any duties associated with the officer's job or office. *Id.* at 706-707; see also *People v Hardrick*, 258 Mich App 238, 247; 671 NW2d 548 (2003). The *Hardrick* panel found that the "defendant acted with a corrupt purpose when he made deliberate and knowing use of [an] advance copy of [a] test to assist him in taking the sergeant's examination and thereby improperly obtain[ed] a promotion." *Id.*

The cases in the preceding paragraph equated corrupt behavior with intentional, purposeful, deliberate, and knowing wrongful behavior.

In *Medlyn*, 215 Mich App at 345, this Court construed MCL 750.478, and more particularly the words "willful neglect," finding that "[t]he trial court properly instructed the jury that a 'bad purpose' was essential for criminal liability and that the 'bad purpose' element could

[5] Misconduct in office "does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties." *Coutu*, 235 Mich App at 706.

be met upon a mere showing that defendant failed to do what he was obligated to do." When utilized in a criminal context, the term "willfully" has been variously defined in the caselaw as meaning and embodying "evil intent," "guilty knowledge," or a "bad purpose," and it indicates a purpose and knowledge to do wrong. *People v Greene*, 255 Mich App 426, 442; 661 NW2d 616 (2003); *People v Lockett (On Rehearing)*, 253 Mich App 651, 654; 659 NW2d 681 (2002); *Medlyn*, 215 Mich App at 344-345; *People v Culp*, 108 Mich App 452, 456; 310 NW2d 421 (1981); *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976). Of course, "willful" also describes conduct that is intentional, purposeful, voluntary, deliberate, and knowing. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994).

On consideration of the authorities cited above, we see no relevant difference between corrupt behavior and willful neglect in the context of nonfeasance in relationship to a legal duty or obligation concerning nondiscretionary or ministerial acts. We find further support for this proposition in the following passages from Perkins & Boyce, Criminal Law (3d ed), p 541-542, 546-547, which is a treatise that was cited in *Perkins*, 468 Mich at 456, and *Coutu*, 235 Mich App at 705-706:

> [T]here should be no conviction of [misconduct in office] . . . if the absence of any element of corruption has been clearly established, unless the prosecution is under a statute substantially different from the common law in this respect. . . . It is possible, of course, for legislation to go beyond the common law and to include within the area of punishability certain acts which were not previously criminal. If the statute provides that an intentional violation of its provisions constitutes guilt, no more is required, but this is not truly an enlargement of the offense because it is *corrupt* for an officer purposely to violate the duties of his office.
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> Any intentional and deliberate refusal by an officer to do what is unconditionally required of him by the obligations of his office is *corrupt* as the word is used in this connection because he is not permitted to set up his own judgment in opposition to the positive requirement of the law. Since this is corrupt misbehavior by an officer in the exercise of the duties of his office there is no reason to require more for conviction. On the other hand, when the officer has discretion in regard to a certain matter, his intentional and deliberate refusal to act indicates no more, on its face, than that this represents his judgment as to what will best serve the public interest. Even in such a case the officer will be guilty of misconduct in office if his forbearance results from corruption rather than from the exercise of official discretion, but it will always be necessary to show something more than the intentional and deliberate forbearance to do a discretionary act.

MCL 750.478 addresses ministerial or nondiscretionary acts, where it speaks of performing duties "enjoined by law." And the charges brought against defendant alleged a failure to perform judicial duties that were nondiscretionary – it is not the AG's position that defendant had discretion in deciding whether or not to conceal or disclose information. Indeed, the AG

states in its supplemental brief that "[f]or nondiscretionary acts, as here, the refusal to perform is corruption per se."

In *Perkins*, 468 Mich at 456, the Court first indicated that misconduct in office, in general, encompassed "corrupt behavior," but it then proceeded to make the following statement, which has been the bane of the parties' analysis:

> [C]ommitting nonfeasance or acts of malfeasance or misfeasance are not enough to constitute misconduct in office. In the case of malfeasance and misfeasance, the offender also must act with a corrupt intent, i.e., with a "sense of depravity, perversion or taint." In the case of nonfeasance, an offender must willfully neglect to perform the duties of his office. Perkins, p 547. [*Id.* (citations omitted).]

In our view, reading the Supreme Court's words in context, the Court was not intending to indicate that corrupt behavior played no role in regard to nonfeasance, especially given its initial proclamation that misconduct in office "was defined as 'corrupt behavior' by an officer." *Id.* Rather, the Court was implicitly equating willful neglect to corrupt behavior. This becomes crystal clear when one looks at the discussion in Perkins & Boyce, p 547, which was the specific citation given by the Supreme Court in support of its statement that nonfeasance entails a willful neglect to perform the duties of office. *Perkins*, 468 Mich at 456. On page 547 of Perkins & Boyce, the author states:

> Confusion at this point has led to the occasional suggestion that the mental element required for the crime of misconduct in office is "wilfulness" if the act is one of omission and "corruption" if it is an act of commission [misfeasance or malfeasance]. "Wilfulness," as so used, is intended to mean deliberate forbearance, and to repeat a previous suggestion: what should be said is that the wilful refusal of an officer to perform a ministerial act required by law constitutes *corruption*. [Emphasis added.]

This proposition is entirely consistent with our discussion of the Michigan authorities set forth earlier, and it results in an interpretation of *Perkins* that is consistent with the mass of cases that include a corruption element with respect to all aspects of misconduct in office, including misconduct by nonfeasance. There is no need to engage in a dicta analysis. Willful neglect of duty and corrupt nonfeasance are effectively one in the same for our purposes. If a public officer willfully neglects to perform a legal duty, he or she engaged in corruption or corrupt behavior.

The dissent argues that the felony statute relative to misconduct in office includes the element of criminal intent, while the misdemeanor statute does not require the prosecution to establish criminal intent. The requisite "intent" for purposes of misconduct in office under MCL 750.505 is the intent to engage in corruption or corrupt behavior; a corrupt intent needs to be proven. *Perkins*, 468 Mich at 456; *Hardrick*, 258 Mich App at 244, 246-247; *Milton*, 257 Mich App at 471-472; *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (1999); *Coutu*, 235 Mich App at 706 (misconduct in office requires "a showing of corrupt intent"). As indicated earlier, corrupt intent "can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an

officer." *Id.* "'It is *corrupt* for an officer purposely to violate the duties of his office.'" *Id.* at 706-707 (citation omitted). And, with respect to the misdemeanor statute, MCL 750.478, the term "willful" encompasses a knowledge and purpose to commit a wrong ("bad purpose"), *Lockett*, 253 Mich App at 654-655; *Medlyn*, 215 Mich App at 344-345, while committing an intentional act of nonfeasance. Willful neglect of a duty required by law to be performed by an officer, i.e., deliberate forbearance, necessarily entails the intent to intentionally, knowingly, and purposely misbehave and engage in wrongful conduct. This intent is identical to the corrupt intent needed to establish misconduct in office under MCL 750.505; therefore, there is no pertinent distinction between the statutes in regard to the "intent" element.

The dissent complains that our analysis results in an unjustifiable felony-misdemeanor distinction between malfeasance and nonfeasance for behavior that may be equally egregious. First, such an argument bears on a matter of policy with respect to punishment and is thus within the exclusive domain of the Legislature. Second, our Supreme Court in *Thomas*, 438 Mich 448, was more than prepared to make a similar distinction had the alleged conduct actually constituted nonfeasance as governed by the relevant misdemeanor statute.

The AG posits that the validity of a charge brought under MCL 750.505 for misconduct in office predicated on nonfeasance is well-established by all of the cases and to rule otherwise would conflict with precedent. The gaping hole in this argument is that none of the cases confronted the issue regarding the interplay between MCL 750.478 and MCL 750.505; the matter has never been addressed in the caselaw.[6]

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[6] We note that while MCL 750.478 governs *as between* it and MCL 750.505 under the charges presented here, there may be an argument that MCL 752.11, which was addressed in *Thomas*, 438 Mich 448, controls over MCL 750.478. As indicated above, MCL 750.478 addresses willful neglect in the performance of a duty, "where no special provision shall have been made for the punishment of such delinquency." Clearly, MCL 750.505 is not a "special provision," but rather a broad common-law catchall provision. MCL 752.11, however, provides:

> Any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who wilfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.

There is no need to reach the issue whether any potential misdemeanor prosecution, in whole or in part based on the framing of the charges, would need to be pursued under MCL 752.11 instead of MCL 750.478. Furthermore, assuming that MCL 752.11 is the controlling statute, the same analysis and reasoning that support our finding that MCL 750.478 governs over MCL 750.505 might perhaps support a finding that MCL 752.11 controls over MCL 750.505. See *Thomas*, 438 Mich 448. Not having surveyed the entire Penal Code in all its vastness, it is conceivable that the AG's charges fit within a yet more narrowly-tailored statute. That said, the bottom line is that the instant prosecution, as currently charged, cannot be maintained under MCL 750.505.

The AG also argues that mere negligence is sufficient to prove willful neglect under MCL 750.478, thereby distinguishing that misdemeanor nonfeasance offense from a felony nonfeasance offense under MCL 750.505, which requires greater culpability by insisting on proof of corrupt behavior or an intentional failure to perform. The clear language of MCL 750.478 precludes any interpretation suggesting that negligence would suffice. As read in context in MCL 750.478, "neglect" means a failure to perform a legal duty, not negligence. A willful failure to perform does not encompass negligent conduct. One cannot negligently, willfully fail to perform.

Finally, and as somewhat alluded to in footnote 6, we find it extremely important to emphasize that while we conclude that the AG's case against defendant cannot be maintained under MCL 750.505 as currently charged, we are not substantively ruling that there are no legal problems or potential obstacles to the AG pursuing misdemeanor charges under MCL 750.478, should the AG decide to renew charges against defendant. For example, whether the ex-parte communications can be the basis for a criminal conviction under MCL 750.478 is not expressly before us, as charges under that statute have not been brought. Similarly, whether a violation of the Code of Judicial Conduct can form the basis for criminal charges is not presently before the Court. But see *Clayton v Willis*, 489 So2d 813, 815 (Fla, 1986); *People v La Carrubba*, 46 NY2d 658, 663-664; 389 NE2d 799 (1979).

III. CONCLUSION

We hold that MCL 750.478 constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance), which is the type of misconduct set forth in the particular charges brought by the AG against defendant. The elements of the charged offense are the elements of a statutory offense, MCL 750.478. Therefore, under the plain and unambiguous language in MCL 750.505, which is the statute relied on by the AG in regard to the four counts at issue, MCL 750.505 cannot be invoked as a basis to try and convict defendant. Defendant is entitled to dismissal of the charges without prejudice. Accordingly, we affirm the circuit court's ruling quashing counts 12, 13, and 14 of the complaint, albeit for different reasons; however, we reverse the court's ruling allowing count 15 to proceed to trial.

Affirmed in part, reversed in part, and remanded for entry of an order fully dismissing the charges against defendant without prejudice. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Christopher M. Murray